No. 92-484

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

UNITED STATES NATIONAL BANK
OF OREGON, - - - - - - - Petitioner,

v.

INDEPENDENT INSURANCE AGENTS
OF AMERICA, INC., et al., - - Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF OF KENTUCKY BANKERS ASSOCIATION, THE OWENSBORO NATIONAL BANK, THE FIRST NATIONAL BANK OF LOUISA, AND CITIZENS NATIONAL BANK OF PAINTSVILLE AS AMICI CURIAE IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether the court below in 1992 correctly determined that Congress inadvertently repealed in 1918 a statute, enacted only two years earlier in 1916, which granted national banks in small towns the authority to act as insurance agents and under which national banks have been continuously operating ever since?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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BRIEF OF KENTUCKY BANKERS ASSOCIATION, THE OWENSBORO NATIONAL BANK, THE FIRST NATIONAL BANK OF LOUISA, AND CITIZENS NATIONAL BANK OF PAINTSVILLE AS AMICI CURIAE IN SUPPORT OF THE PETITION

Kentucky Bankers Association, The Owensboro National Bank, The First National Bank of Louisa, and Citizens National Bank of Paintsville submit, with the consent of Petitioner and Respondents, this brief as *amici curiae* in support of the petition for a writ of certiorari filed by petitioner, United States National Bank of Oregon.

INTEREST OF THE AMICI CURIAE

The Owensboro National Bank, The First National Bank of Louisa and Citizens National Bank of Paintsville are national banking associations (*i.e.*, national banks) organized under the laws of the United States (12 U.S.C. §§21 *et seq.*). Each is located and doing business in a town in Kentucky with a population which does not exceed 5,000 inhabitants as shown by the 1990 Census.

Kentucky Bankers Association (the "KBA") is a trade association of banks in Kentucky. Each of the three national banks is a member of the KBA. In addition, 81 of the 82 other national banks located in Kentucky are members of the KBA.

All four of the *amici curiae* (collectively referred to herein as the "National Banks") are parties to litigation initially filed in the United States District Court for the Eastern District of Kentucky and currently pending before the United States Court of Appeals for the Sixth Circuit concerning the right of national banks located and doing business in towns with a population which does not exceed 5,000 inhabitants as shown by the last preceding decennial census (hereinafter "qualified national banks") to act as the agent for any fire, life or other insurance company. *Owensboro National Bank* v. *Moore*, No. 91-3 (E.D. Ky.), *appeal docketed*, No. 92-6330/31 (6th Cir.) (hereafter the "Kentucky Litigation").

In the Kentucky Litigation, the National Banks seek to (a) compel the Kentucky Department of Insurance to issue them applications to become insurance agents for non-credit related insurance and (b) prohibit the department from denying their applications for insurance agent licenses on the ground that they are submitted by banks.

The Kentucky Department of Insurance and three intervening insurance trade associations (collectively referred

to as the "Insurance Industry") have opposed the National Banks on the ground that Kentucky law prohibits banks from acting as insurance agents for non-credit related insurance.

In response, the National Banks argue, among other things, that federal law preempts the Kentucky law on which the Insurance Industry relies. The United States of America has intervened in the case and the American Bankers Association has appeared as *amicus curiae*, both supporting the National Banks.

The federal law on which the National Banks rely was enacted in 1916 and has historically been referred to as 12 U.S.C. §92. *See Act of September 7, 1916*, Pub. L. No. 64-270, 39 Stat. 752, 753-754 (the "1916 Act"). That law expressly provides that a national bank:

> ". . . located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of Currency, act as the agent for any fire, life or other insurance company . . . ."

The National Banks use the word "historically" when referring to 12 U.S.C. §92 since the language added by the 1916 Act was codified during the years 1926 through 1952 as Section 92 of Title 12 of the United States Code. However, in 1952, the legislation was "omitted" from the United States Code by the unilateral action of the compiler of the United States Code.[1] The compiler believed, based upon

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[1]The statement that §92 was "omitted" is particularly unusual if the compiler was correct that §92 was repealed in 1918. That is because the 1952 Code uses the term "repealed" with respect to other statutes which Congress "repealed". *Compare* 12 U.S.C. §2 (1952) and 12 U.S.C. §51d (1952) *with* 12 U.S.C. §92 (1952).

the placement of some quotation marks in the 1916 Act as printed, that §20 of War Finance Corporation Act of 1918 had the effect of repealing §92.[2]

Obviously, the "omission" of §92 was the cause of some concern at the time. However, upon careful examination during Congressional hearings in 1958, Congress and the federal banking regulators rejected the conclusion that §92 had been repealed. *See Financial Institutions Act of 1957: Hearings Before the House Banking and Currency Committee on S. 1451 and H.R. 7026*, 85th Cong., 2d Sess. (1958) (hereinafter "1958 Hearings"). Indeed, Congress has on two occasions since 1916 enacted legislation affecting §92.[3]

Nevertheless, the United States Code has continued to "omit" §92. *See* 12 U.S.C. §92 (1988).[4] On the other hand, §92 appears in the United States Code Service published

[2]*See* War Finance Corporation Act, Pub. L. No. 65-121, §20, 40 Stat. 506, 512 (1918).

[3]*See Garn-St. Germain Depository Institutions Act*, Pub. L. No. 97-320, §403(b), 96 Stat. 1469, 1511 (1982) (deleting language from §92 relating to geographic limits on §92 real estate loan brokerage activity); *See also Competitive Equality Banking Act of 1987*, Pub. L. No. 100-86, §201(b)(5), 101 Stat. 552, 581-583 (1987) (imposing a one-year moratorium on national banks expanding §92 insurance agency activities to geographic regions not then served).

[4]Currently, 1 U.S.C. §208 (1988) provides that publication of the United States Code is the responsibility of the Committee on the Judiciary of the House of Representatives or such other agency as the Congress may by concurrent resolution provide. Section 205(c) of House Resolution No. 988, 93rd Cong. (Oct. 8, 1974), assigned responsibility to the Office of the Law Revision Counsel. Effective January 2, 1975, House Resolution No. 988 was enacted into permanent law codified at 2 U.S.C. §285 through §285g (1988). *See Supplemental Appropriations Act of 1975*, Pub. L. No. 93-554, Title I, Ch. III, §101, 88 Stat. 1771, 1777 (1975).

by The Lawyers Co-operative Publishing Co. with the explanation that the position of the compilers of the United States Code "is not consistent with the case law." *See* 12 U.S.C.S §92 (Law. Co-op. 1978 & Supp. 1992).[5]

The editors of the United States Code Service are correct. Until this year, every court since 1916 had treated §92 as being in existence.[6] However, that unanimity ended on February 7, 1992, when the United States Court of Appeals for the District of Columbia Circuit issued its opinion in this case "find[ing] *sua sponte* that that section [§92] has been repealed". *Independent Ins. Agents of America, Inc.* v. *Clarke*, 955 F.2d 731, 732 (D.C. Cir. 1992). This decision was highly unusual since even the plaintiffs in that case (the Respondents here) stated during oral argument that "we have concluded that we cannot advance a substantial argument that section 92 no longer exists." 955 F.2d at 741 (Silberman, J., dissenting).

The D.C. Circuit's decision was rendered only five days before oral argument in the Kentucky Litigation on the

[5]Because Title 12 of the United States Code has not been enacted into positive law, the compilation is treated as "prima facie the laws of the United States." 1 U.S.C. §204(a) (1988). However, that presumption can be overcome by recourse to the original statutes themselves. *United States* v. *Welden*, 377 U.S. 95, 98 n.4 (1963).

[6]*E.g., Commissioner of Internal Revenue* v. *First Security Bank of Utah, N.A.*, 405 U.S. 394 (1972); *First National Bank of Lamarque* v. *Smith*, 610 F.2d 1258, 1261 n.6 (5th Cir. 1980); *Independent Bankers Ass'n of America* v. *Heimann*, 613 F.2d 1164, 1170 & nn.18-20 (D.C. Cir. 1979); *Saxon* v. *Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010, 1013 (5th Cir. 1968); *Commissioner of Internal Revenue* v. *Mary Archer W. Morris Trust*, 367 F.2d 794, 795 n.3 (4th Cir. 1965); *Genessee Trustee Corp.* v. *Smith*, 102 F.2d 125 (6th Cir. 1939); *Thompson* v. *Kerr*, 555 F. Supp. 1090, 1906 & n.6 (S.D. Ohio 1982); *Guaranty Mortgage Co.* v. *Z.I.D. Associates, Inc.*, 506 F. Supp. 101, 104 (S.D.N.Y. 1980).

merits of the National Banks' preemption claim. After being advised at the oral argument of the D.C. Circuit's decision, the Kentucky District Court entered an order directing that the parties file memoranda addressing whether §92 had been repealed.

While the District Court in the Kentucky Litigation was considering the memoranda submitted by the National Banks and the other parties, the United States Court of Appeals for the Second Circuit also felt "compelled to address this issue [of §92's existence]" in light of the D.C. Circuit's decision "even though the parties neither briefed nor argued it." *American Land Title Ass'n* v. *Clarke*, 968 F.2d 150, 151 (2d Cir. 1992) ("*ALTA*").

At issue in *ALTA* was whether the Comptroller of the Currency (the "Comptroller") properly decided that a national bank, not located and doing business in a small town, may engage in the title insurance agency business. The existence of §92 was considered relevant in addressing the legality of the Comptroller's decision since competing insurance trade associations argued that §92 impliedly prohibits national banks from selling title insurance in towns with more than 5,000 inhabitants.

On June 15, 1992, the Second Circuit flatly rejected the D.C. Circuit's analysis and expressly held that "the only rational interpretation" was that Congress did not repeal §92 in 1918. *ALTA*, 968 F.2d at 154.[7]

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[7]Chase Manhattan Bank, N.A. and the United States of America have filed petitions for a writ of certiorari to review the judgment in *ALTA*. *Chase Manhattan Bank, N.A.* v. *American Land Title Ass'n*, No. 92-482 (U.S. Sept. 17, 1992); *Steinbrink* v. *American Land Title Ass'n*, No. 92-645 (U.S. Oct. 13, 1992). Those

(Footnote continued on following page)

On August 5, 1992, the District Court in the Kentucky Litigation entered its Memorandum Opinion and Order considering §92's existence in light of the split in authority created by the D.C. and Second Circuit decisions.

Like the Second Circuit, the District Court in the Kentucky Litigation concluded that a decision that §92 had been repealed "would be to circumvent logical statutory construction." Indeed, the District Court expressly adopted the reasoning of the Second Circuit and further stated that its own "examination of the legislative history of §92 would have led it to the same conclusion quite apart from the Second Circuit's decision." *See* App., *infra*, 15a-16a.

Having concluded that §92 exists, the District Court further held that §92 preempted the Kentucky statute relied upon by the Insurance Industry and enjoined the Kentucky Department of Insurance from refusing to issue insurance agent applications to qualified national banks.

On October 5, 1992, the Insurance Industry defendants in the Kentucky Litigation filed notices of appeal. In their Pre-Argument Statements filed with Sixth Circuit, the In-

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(Footnote continued from preceding page)

petitions seek review of the Second Circuit's decision that §92 impliedly bars national banks not located in small towns from acting as title insurance agents. Chase Manhattan Bank's petition also asks the Court to resolve the issue of §92's existence.

Because all parties in the *ALTA* case agreed that §92 exists, the National Banks respectfully submit that review of the D.C. Circuit's decision (where the insurance industry respondents ultimately argued that §92 has been repealed) is the superior vehicle for presenting the dispute as the §92's existence. However, the National Banks fully support the petitions seeking review of the Second Circuit's decision (which the National Banks believe is incorrect) on the title insurance power issue.

surance Industry states that it intends to raise the issue of §92's existence.

As parties to the Kentucky Litigation — a case that concerns the preemptive effect of §92 — the National Banks plainly have a direct and substantial interest in whether or not §92 was repealed in 1918. That issue has festered for almost seventy-five years and will continue to distract affected parties and the lower federal courts until it is definitely resolved by this Court.

Accordingly, the National Banks appear in this case to urge this Court to issue a writ of certiorari and authoritatively state that §92 remains the law of these United States.

REASONS FOR GRANTING THE WRIT

I. A Decision On The Continued Existence Of 12 U.S.C. §92 Is Necessary To Resolve A Conflict In The Courts Of Appeals On A Substantial Question Of Federal Law.

A "principal purpose" for granting a writ of certiorari is to "resolve conflicts among the Circuit Court of Appeals and state courts concerning the meaning of provisions of federal law." *Braxton* v. *United States*, ___ U.S. ___, 111 S.Ct. 1854, 1856 (1991). *See also* Supreme Court Rule 10.1(a). In this case, the D.C. Circuit's decision is in direct conflict with the decision of the Second Circuit in *ALTA*.

Review is particularly appropriate because the conflict has called into question the existence of a federal statute as well as the legality of widespread and substantial insurance activities of national and state banks across the country. *Cf., Federal Savings and Loan Insurance Corp.* v. *Ticktin*, 490 U.S. 82, 83 (1989) (granting certiorari where Court of Appeals' decision "would require dismissal of large number of cases concerning the integrity of our financial institutions").

The evidence presented by the Comptroller in the Kentucky Litigation was that as many as 179 national banks in fifteen states conduct insurance agency activities pursuant to 12 U.S.C. §92. In addition, the Comptroller estimated that at least 115 state chartered banks sell insurance under state parity statutes that permit them to engage in the same activities as national banks. *See* Declaration of Rosa M. Koppel, Esq. ¶¶6, 7 (Apr. 14, 1992) (App., *infra*, 25a). *See also* Ariz. Rev. Stat. Ann. §6-184.2; Ill. Rev. Stat. ch. 17, para. 311(11); Md. Fin. Inst. Code Ann. §5-504; N.D. Cent. Code Ann. §6-03-38; Utah Code Ann. §7-3-10(1).

That those insurance activities have been undertaken in reliance upon a statute that has been treated by the Comptroller, the courts, and Congress as being in existence since 1916 makes it particularly appropriate to review a decision by the D.C. Circuit suddenly invalidating that statute. *Cf. Bankamerica Corp.* v. *United States*, 462 U.S. 122, 132 (1983) (refusing to permit the Department of Justice to change its interpretation of the Clayton Act to prohibit interlocking directorates between a bank and an insurance company where the affected industry and Congress had relied on the Department's interpretation for over 60 years); *Wisconsin* v. *Illinois*, 278 U.S. 367, 413 (1928).

Furthermore, the implications of this case extend beyond whether national banks in small towns may act as insurance agents.

First, the analysis used by the D.C. Circuit to "repeal" §92 is equally applicable to two other statutes which the United States Code also "omits":

> (a) 12 U.S.C. §361, a paragraph contained in Section 13 of the Federal Reserve Act of 1913 relating to the rediscount by Federal Reserve Banks of bills of exchange which immediately precedes the language of

§92 and which was slightly amended by the 1916 Act; and

(b) 12 U.S.C. §373, a paragraph added by the 1916 Act immediately following the language of §92 and which relates to the acceptance by member banks of the Federal Reserve System of drafts for foreign exchange purposes.[8]

See Opinion of Robert Neill, Counsel for the Advisory Committee for the Study of Federal Statutes Governing Financial Institutions and Credits (Feb. 1, 1958), *reprinted in* 1958 Hearings 1010, 1022-1023.

Second, because courts have regularly resolved other banking issues by drawing inferences from §92, a decision that §92 does not exist inevitably calls those decisions into question. *See Commissioner of Internal Revenue* v. *First Security Bank of Utah, N.A.*, 405 U.S. 394 (1972) (relying on §92 to overturn a determination by the Commissioner of Internal Revenue attributing to certain banks in large cities income derived from the sale of insurance policies by affiliated companies); *Alabama Ass'n of Ins. Agents* v. *Board of Governors of the Federal Reserve System*, 533 F.2d 224 (5th Cir. 1976), *modified*, 558 F.2d 729 (1977), *cert. denied*, 435 U.S. 904 (1978) (initially relying on §92 to invalidate Federal Reserve Board regulations which would have permitted non-bank subsidiaries of bank holding companies to sell insurance in small towns or towns with inadequate insurance agency facilities); *Genessee Trustee Corp.* v. *Smith*, 102 F.2d 125, 127 (6th Cir. 1939) (language of §92

[8]Interestingly, while the 1952 Code did "omit" 12 U.S.C. §373 (1952), it did *not* "omit" 12 U.S.C. §361 (1952) even though this paragraph should be treated as repealed under the analysis which supposedly justified omitting §92. The 1958 Code eliminated this inconsistency and "omitted" 12 U.S.C. §361 (1958). *Compare* 12 U.S.C.S. §361 (Law. Co-op. 1992) (omitting section) *with* 12 U.S.C.S. §373 (Law. Co-op. 1992) (not omitting section).

supported a determination that national banks may only sell and indorse promissory notes on a non-recourse basis).

In addition to those final decisions, there are two other important cases currently pending in which §92 has played a key role. In addition to the Second Circuit's decision in *ALTA*, the Fifth Circuit is considering the validity of the Comptroller's determination that a national bank may sell fixed rate and variable rate annuities through a securities subsidiary. *Variable Annuity Life Ins. Co.* v. *Clarke*, 786 F. Supp. 639 (S.D. Tex. 1991), *appeal docketed*, No. 92-2010 (5th Cir. Dec. 23, 1991). The competing annuity underwriter which brought the action is arguing that annuities are insurance products and §92 bars the Comptroller from permitting a national bank not located in a small town from selling insurance products.

In light of the importance of §92 to the national banking system, plenary review by this Court is plainly warranted.

II. Immediate Review Is Appropriate Since The D.C. Circuit's Decision Was Seriously Flawed And Arguments Are Being Advanced That The Decision Will Be Effectively Binding In Other Circuits.

This is not a case where the Court should wait for additional decisions from other Courts of Appeals. Quite simply, and as the petitions for writ of certiorari plainly demonstrate, the analysis of the D.C. Circuit was so seriously flawed that it should not be permitted to remain as precedent.

There is already ample authority indicating that the decision of D.C. Circuit was incorrect. In addition to the recent decisions by the Second Circuit and in the Kentucky Litigation, the issue of whether §92 was repealed in 1918 was found to be "moot" by the Fifth Circuit over a decade ago. *First National Bank of Lamarque* v. *Smith*, 610 F.2d 1258, 1261 n.6 (5th Cir. 1980).

Failure to review the D.C. Circuit's erroneous decision would be particularly perilous since the Insurance Industry in the Kentucky Litigation argued (albeit incorrectly) that the D.C. Circuit's decision will govern the conduct of national banks located in other circuits. Specifically, in their memorandum filed with the District Court addressing the effect of the D.C. Circuit's decision, the Insurance Industry argued:

> The D.C. Circuit held that the Comptroller, the defendant in *IIAA* v. *Clarke*, unlawfully authorized a national bank to sell insurance pursuant to Section 92 . . . . As a result of *IIAA* v. *Clark*, the plaintiff banks in this case [the *amici curiae* National Banks] cannot obtain valid authorization from the Comptroller to sell non-credit insurance from the small towns in which they have offices. Should the Comptroller grant plaintiffs approval despite the D.C. Circuit's decision in *IIAA* v. *Clark*, these defendants [the Insurance Industry] would challenge the Comptroller's actions in federal court in the District of Columbia. Were the banks to attempt to sell non-credit insurance without Comptroller authorization, these defendants would bring a mandamus action against the Comptroller in federal court in the District of Columbia, seeking the agency's enforcement of the National Bank Act. In either case, the court would be bound by the D.C. Circuit's decision in *IIAA* v. *Clark*: The court would necessarily hold that Section 92 does not exist and therefore does not authorize the plaintiff banks to sell non-credit insurance.

Defendant's and Intervenors' Joint Post-Argument Brief, *Owensboro National Bank.* v. *Moore*, No. 91-3 (E.D. Ky.) at 5-6 (served Mar. 24, 1992) (footnotes omitted).[9]

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[9]The Insurance Industry's argument as to the binding effect on the National Banks of the D.C. Circuit's decision is incorrect. First, the D.C. Circuit's decision is not binding with respect to

(Footnote continued on next page)

This Court should review the D.C. Circuit's decision to avoid enmeshing other national banks in the kind of enforcement quagmire with which the Insurance Industry has threatened the National Banks in the Kentucky Litigation.

III. The D.C. Circuit's Decision Is In Conflict With This Court's Decision In *Commissioner of Internal Revenue* v. *First Security Bank of Utah, N.A.*

This Court's Rule 10.1(c) provides that a reason justifying review is that the lower court's decision "decided a federal question in a way that conflicts with applicable decisions of this Court." In this case, the D.C. Circuit's decision is in conflict with the decision in *Commissioner of Internal Revenue* v. *First Security Bank of Utah, N.A.*, 405 U.S. 394 (1972).

In that case, this Court refused to permit the Commissioner of Internal Revenue to reallocate to certain national banks, for tax purposes, a portion of credit life insurance premiums earned by affiliates of the banks. One basis for the decision that reallocation was improper was that §92 prohibited the national banks from receiving the premiums.

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any obligations that the United States may have toward the National Banks who were not parties to that litigation. *See United States* v. *Mendoza*, 464 U.S. 154 (1984) (United States not subject to non-mutual collateral estoppel). Second, even if the Insurance Industry could compel the Comptroller to bring an enforcement action against the National Banks, under 12 U.S.C.A. §1818(b)(1), §1818(h), and §1818(i) (West 1989 and Supp. 1992), any enforcement action would have to be brought in the Sixth Circuit, and the D.C. Circuit's decision is plainly not binding there. *United States* v. *Dawson*, 576 F.2d 656, 659 (5th Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979); *Kirsch Co.* v. *Bliss and Laughlin Industries, Inc.*, 495 F.Supp. 488, 492 (W.D. Mich. 1980).

The Supreme Court so relied on §92 even though both the majority opinion and Justice Blackmun's dissent called attention to §92's omission from the U.S. Code. *See* 405 U.S. at 401 n.12, 418 n.2, 419. Indeed, Justice Blackmun noted the majority's "repetitive emphasis on the missing §92." *See* 405 U.S. at 419. Justice Marshall dissented on the ground that the national banks were violating §92, and he made no mention of the repeal issue. *See* 405 U.S. at 411-414.

The D.C. Circuit attempted to distinguish the Supreme Court's analysis by stating that the Supreme Court only assumed §92's validity and "never directly addressed" the issue of its alleged repeal. *Independent Insurance Agents*, 955 F.2d at 737-739.

While this Court never explicitly held that §92 had not been repealed, it is difficult to square the Court's repeated discussion of §92 with the conclusion that §92 no longer existed (particularly when the Court was plainly aware of the issue). This difficulty is particularly true when Justice Blackmun cited pages 777 through 779 of Howard Hackley's article *Our Baffling Banking System — Part II*, 52 Va. L. Rev. 771 (1966). *See First Security Bank*, 405 U.S. at 418 n.2. In his article, Hackley, who was then General Counsel to the Board of Governors of the Federal Reserve System, wrote:

> [T]he Comptroller was clearly correct [that §92 was not repealed in 1918]. The provisions in question were omitted from the United States Code in 1952 (*not* in 1918) by a careless codifier simply because an inadvertently misplaced quotation mark in a 1918 amendment to Section 5202 of the Revised Statutes relating to an entirely different subject. Unquestionably the codifier was wrong and the provision authorizing national banks to act as insurance agents is still in force.

52 Va. L. Rev. at 778.

Even assuming the D.C. Circuit's reading is correct, this Court's discussion of §92 in *First Security Bank* is informative for what was not said. This Court did not say that the issue of §92 repeal was so clear that it could not rely on §92. On the other hand, the Court did say that the Comptroller's "administrative interpretation [of the meaning of §92] over many years is entitled to great weight." *Id.* at 403 n.16.

At the very least, the D.C. Circuit's opinion is very questionable in light of the *First Security Bank* decision and review is appropriate to resolve the confusion.

IV. That Portion Of The D.C. Circuit's Decision As To The Existence Of §92 Should Be Addressed Even If The Court Determines That The D.C. Circuit Acted Inappropriately In Raising The Issue *Sua Sponte*.

Petitioner, United States National Bank of Oregon, also seeks review on whether or not the D.C. Circuit acted erroneously by *sua sponte* raising the issue of §92's existence when the litigants did not address the question before the District Court or initially in the D.C. Circuit. *See* Petition of the United States National Bank of Oregon, Question Presented #2.

Conceivably this Court could reverse on the ground that it was inappropriate for the D.C. Circuit to consider the issue of §92's repeal. *Cf. Board of Governors of the Federal Reserve System* v. *MCorp. Financial, Inc.*, ___ U.S. ___, 112 S.Ct. 459 (1991) (reversing Court of Appeal's decision which invalidated the Federal Reserve Board's "source of strength" regulation on the ground that Court of Appeals did not have jurisdiction to consider the merits).

However, the National Banks strongly urge that this Court exercise its certiorari power and resolve the issue of

the existence of §92 regardless of the Court's view as to whether or not it was proper for the D.C. Circuit to address the matter.

Ever since the unilateral decision in 1952 by the codifier of the United States Code to "omit" §92, the issue of §92's repeal has been a recurring concern. A reversal of the D.C. Circuit's decision on jurisdictional grounds will only serve to further muddy the waters. Litigants will still be able to argue that the D.C. Circuit's analysis was correct.[10]

Quite simply, in 1972, this Court left unresolved the question of §92's existence when it noted the issue in *Commissioner of Internal Revenue* v. *First Security Bank of Utah, N.A.*, 405 U.S. 394, 401 n.12 (1972), but did not render a clearly authoritative decision. The issue has again arisen and has put in disarray the authority for qualified national banks to act as insurance agents. This Court should not permit the issue to fester further. It should resolve the matter once and for all.

CONCLUSION

In light of the conflict in the circuits, the importance of the issue, and the reoccurring nature of the dispute, this Court should grant the petition for a writ of certiorari and should decide whether Congress repealed 12 U.S.C. §92 in 1918.

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[10]That Congress could enact legislation plainly reenacting §92 also is not a sufficient reason for delaying review. *See Braxton* v. *United States*, ___ U.S. ___, 111 S.Ct. 1854, 1857 (1991) (the task of clarifying federal statutes is "initially and primarily" that of the Supreme Court).

Respectfully submitted,

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November 21, 1992

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

Civil Action No. 91-3

THE OWENSBORO NATIONAL BANK, *et al.*, - - *Plaintiffs,*

and

UNITED STATES OF AMERICA, - - *Intervening Plaintiff,*

v. **MEMORANDUM OPINION AND ORDER**

RONNIE C. MOORE, Commissioner, - - - *Defendant,*

and

KENTUCKY STATE ASSOCIATION OF LIFE UNDERWRITERS, *et al.*, - - *Intervening Defendants.*

This matter is before the court upon several pending motions. The defendant, Ronnie C. Moore, the Commissioner of the Kentucky Department of Insurance (the Commissioner), has moved to dismiss the complaint. [Record #4]. The intervening defendants (collectively referred to as "the associations") have also filed a motion to dismiss. [Record #7]. The plaintiffs have moved for summary judgment, [Record #14], as have the Commissioner and the associations. [Record #28]. Finally, the United States has moved for summary judgment on its intervening complaint. [Record #60]. These motions have been fully briefed and argued to the court, and this matter is ready for consideration.

I. Factual Background

The underlying facts of this case are undisputed. The plaintiff banks are national banking associations organized under the laws of the United States. Two of the plaintiffs, The First National Bank of Louisa, and Citizens National Bank of Paintsville are located in Kentucky towns with less than 5,000 inhabitants, as shown by the 1990 Decennial Census. The other banking plaintiff, The Owensboro National Bank, maintains a branch in Whitesville, Kentucky, which also has a 1990 population of less than 5,000 persons. Each plaintiff bank is owned by a bank holding company.

In the fall of 1990, the plaintiff banks communicated to the Commissioner their wish to apply for licenses to act as general lines and life insurance agents. Responding by letter dated January 10, 1991, the Commissioner declined to immediately provide the requested applications, stating that "such a dramatic change in our long-standing interpretation of both statutory and case law should not be lightly granted." Letter from Commissioner Elizabeth Wright to M. Brooks Senn (January 10, 1991) [Record #16, Tab 6]. Rather, the Commissioner scheduled a public hearing for February 13, 1991, to determine "whether or not the Kentucky Department of Insurance shall issue the insurance agents licenses requested . . . upon completion of the applicable licensing procedures as set forth in KRS 304, Subtitle 9 . . . ." [Record #30, Tab 2].

On January 24, 1991, the plaintiffs filed the present action in this court seeking a declaration of rights and injunctive relief. [Record #1]. Specifically, the plaintiffs asked this court to require the Commissioner's compliance with 12 U.S.C. § 92, which purportedly permits national banks having an office in towns with less than 5,000 inhabitants to act as insurance agents.

The day prior to filing suit, one of the plaintiffs, the Kentucky Bankers Association (the KBA), apparently distributed a memorandum to its members stating that the Commissioner's hearing "could prove to be a circus", and may be "nothing more than a 'name-calling' session." Memorandum from Ballard W. Cassady, Jr. to KBA Members (January 23, 1991) [Record #5, Exhibit C]. The KBA urged its members not to attend the hearing. Nevertheless, the plaintiffs did attend, but called no witnesses. Rather, they submitted written objections to the hearing itself, and restated their legal arguments.

No resolution was attained at the hearing, and the hearing officer permitted the Commissioner to engage in limited discovery, over plaintiffs' objection. [Record #11, Tabs 5 & 6]. The hearing was recessed until April 8, 1991, and at that time additional evidence was presented by the Commissioner. No final action ever resulted from the hearing, and further proceedings in the Department of Insurance were eventually stayed, pending the outcome of this litigation, by order of the Franklin Circuit Court. [Record #24, Exhibit 1].

This matter has been submitted to this court on cross-motions for summary judgment, and the parties have presented arguments on those motions. However, the Commissioner and the associations have asserted that this court does not have subject matter jurisdiction over this action. That assertion must be addressed prior to any consideration of the motions for summary judgment.

II. Justiciability

The Commissioner and the associations raise several arguments in support of their contention that this court lacks subject matter jurisdiction. They contend that this matter is not ripe for decision as no final action has been taken by the Commissioner. They further assert that the plaintiffs have not exhausted their state remedies. Finally, they argue that this court should abstain from adju-

dicating this action because to do so would interfere with ongoing state proceedings, and because the plaintiffs' claims raise unsettled questions of state law.

A. Ripeness

This court is limited to the adjudication of actual cases or controversies. U. S. Const. art. III, §2. For this court to exercise jurisdiction over this case, it must be ripe for decision. The doctrine of ripeness "dictates that the courts should decide only existing, substantial controversies, not hypothetical questions or possibilities." *City Communications, Inc.* v. *City of Detroit,* 888 F.2d 1081, 1089 (6th Cir. 1989). In the context of administrative action, this doctrine prevents courts from becoming involved in disagreements over administrative policies and protects agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 148 (1967).

Here, the Commissioner and the associations argue that because the Department of Insurance was not permitted to complete its administrative process before this suit was filed, the dispute is not ripe for decision. It is true that this action was filed on January 24, 1991, after the plaintiffs received notice of the public hearing on their request for applications, but before the hearing was held. However, as will be seen in detail later, the Commonwealth of Kentucky, acting through its Attorney General and/or the Commissioner, has long taken the position that the plaintiff banks are not authorized to act as insurance agents in Kentucky.

In addressing the issue of ripeness, the court is persuaded by the reasoning of the Supreme Court in *Columbia Broadcasting System* v. *United States,* 316 U.S. 407 (1942). In *CBS,* the Federal Communications Commission had issued a regulation which would have prevented the issu-

ance of radio licenses to stations which signed network affiliation contracts with certain provisions. Although no license had been revoked and the FCC had not refused to grant any license based upon the regulation, the Court held that a challenge to the regulation was ripe. The court specifically noted that the FCC action was no less reviewable because promulgation of the regulation itself did not deny or cancel a license. It was enough that failure to comply with the regulation would penalize the licensees, and ultimately CBS, the contracting network. *Id,* at 417; *see also United States* v. *Storer Broadcasting Co.,* 351 U.S. 192 (1956).

The present situation is similar. Although the Commissioner has not taken final action with respect to the plaintiff banks' requests for applications, his longstanding view of the questions involved constitute action which is sufficiently final to concretely affect the plaintiffs [sic] interests. This view is amply supported by the aggressive stance the Commissioner has taken in this litigation in setting forth his view of both federal and state law in this area and the interaction between both spheres. Ripeness is now viewed as a matter of common sense, and the court is convinced that absolutely no purpose would be served by permitting the Commissioner to continue with his charade of evaluation before this court addresses the merits of this litigation. *See McCoy-Elkhorn Coal Corp.* v. *United States Environmental Protection Agency,* 622 F.2d 260, 264 (6th Cir. 1980).

This decision comports with the Supreme Court's two part ripeness test articulated in *Abbott Laboratories.* There the Court determined that ripeness depends upon both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Abbott Laboratories,* 387 U.S., at 149. This action presents purely legal questions which are fit for judicial decision at this

time. In addition, this court has no difficulty concluding that hardship to the plaintiffs would result if judicial consideration were withheld. This matter is ripe for decision by this court.

B. Exhaustion

When the actions of an administrative agency are involved, exhaustion of remedies is generally required to prevent premature interference with agency processes, so that the agency may function efficiently and correct its own mistakes, to afford the parties and the court the benefit of the agency's expertise, and to compile an adequate record for judicial review. *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975). However, when the issue is solely one of statutory interpretation, judicial review is permitted since resolution of the issue requires no special expertise on the part of the involved agency. *McKart* v. *United States*, 395 U.S. 185, 198-99 (1969).

Here, the issues before the court involve questions of law and statutory interpretation. There is no requirement that the plaintiffs exhaust their administrative remedies under these circumstances. Since the Commissioner has admitted that the plaintiffs meet the location requirements of 12 U.S.C. § 92, [Record #11, Tab 4], any further consideration by the Commissioner would involve the same evaluation of legal issues performed by this court. The plaintiffs' failure to exhaust their state administrative remedies does not prevent this court from exercising jurisdiction over this matter. *Shawnee Coal Co.* v. *Andrus*, 661 F.2d 1083, 1093 (6th Cir. 1981).

C. Abstention

The Commissioner and the associations point to two lines of abstention cases in support of their argument that this court should decline to exercise its jurisdiction in this matter. The court will address each line of cases separately.

1. *Younger* Abstention

Ordinarily, federal courts should not issue declarative or injunctive relief which would interfere with ongoing state proceedings. *Younger* v. *Harris*, 401 U.S. 37 (1971). However, the Commissioner and the associations are incorrect in arguing that *Younger* applies in the present case.

The ultimate question in this litigation is whether state law is preempted by federal law. In that circumstance, abstention is not required. *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 237 (1984). This case neither requires the interpretation of state law nor the making of findings on disputed facts. The considerations which would require *Younger* abstention are not present. *Norfolk & Western Railway Co.* v. *Public Utilities Comm. of Ohio*, 926 F.2d 567, 573 (6th Cir. 1991).

2. *Burford* Abstention

This court should also abstain from granting equitable relief that interferes with proceedings in state administrative agencies which involve complex state regulatory policies, such as ratemaking. *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943). However, like the *Younger* doctrine, *Burford* does not prevent this court from addressing issues of federal preemption of state law. *New Orleans Public Service, Inc.* v. *Council of the City of New Orleans*, 491 U.S. 350 (1989). This case does not implicate *Burford* abstention.

D. The Motions to Dismiss

The motions to dismiss of the Commissioner and the associations are without merit for the reasons stated above. Both motions will be denied.

III. Legal Framework

Prior to evaluating the merits of the cross-motions for summary judgment, it is essential to set forth the legal

framework for the discussion. Both federal and state law are involved, and the court will briefly discuss each.

A. Federal Law

The plaintiff banks are national banking associations organized under the laws of the United States. *See* 12 U.S.C. § 1 *et seq.* The National Banking Act constitutes the paramount authority for the operation of national banking associations, and, by itself, constitutes a complete system for the establishment and government of national banks. *First National Bank in Plant City, Fla.* v. *Dickinson,* 396 U.S. 122 (1969); *Deitrick* v. *Greaney,* 309 U.S. 190 (1940). However, national banks are also subject to state laws, so long as those state laws do not conflict with or frustrate the purpose of laws of the United States. *Starr* v. *O'Connor,* 118 F.2d 548 (6th Cir. 1941).

The National Banking Act was enacted in 1864. Act of June 3, 1864, c. 106, 13 Stat. 99. In 1913, Congress enacted the Federal Reserve Act, Act of December 23, 1913, c. 6, 38 Stat. 251, to foster a flow of credit and money, through both federal and state chartered institutions, which would facilitate orderly economic growth. *Collateral Lenders Committee* v. *Board of Governors of the Federal Reserve System,* 281 F.Supp. 899, 904 (S.D.N.Y. 1968).

In 1916, Congress amended the Federal Reserve Act, adding, among other sections, 12 U.S.C. § 92.[1] This section was added at the request of the Comptroller of the Currency, and allowed national banks located in towns with less than 5,000 inhabitants to sell insurance under certain

[1]The question of whether this section continues to exist will be addressed later in this memorandum opinion and order.

circumstances.[2] The Comptroller has issued a regulation which provides that this section is applicable to any branch of a national bank which is located in a town with less than 5,000 inhabitants, even though the principal office of the national bank may be in a town with a population greater than 5,000 persons. 12 C.F.R. § 7.7100 (1971). Although there is a question as to whether 12 U.S.C. § 92 was repealed in 1918, the Comptroller has continued to assume that the section remains in force. *See e.g.,* Letter from First Deputy Comptroller for Policy Robert Bloom to Oklahoma Insurance Commissioner Gerald Grimes (November 14, 1975) [Record #11, Tab 8]; and Letter from Chief Counsel Paul Allen Schott to Louisiana Insurance

[2]The full text of this section is as follows:

> In addition to the powers now [Sept. 7, 1916] vested by law in national banking associations organized under the laws of the United States any such association located in and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees between the said association and the insurance company for which it may act as agent; and may also act as the broker or agent for others in making or procuring loans on real estate located within one hundred miles of the place in which said bank may be located, receiving for such services a reasonable fee or commission: Provided, however, That no such bank shall in any case guarantee either the principal or interest of any such loans or assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: And provided further, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.
>
> (Sept. 7, 1916, c. 461, 39 Stat. 753).

Commissioner Douglas D. Green (October 30, 1990) [Record #16, Tab 27].

Presently, approximately 179 national banks in fifteen states are conducting insurance activities pursuant to 12 U.S.C. § 92. Affidavit of Rosa M. Koppel, [Record #61, Exhibit 1]. None of these national banks are located in Kentucky. *Id.*

B. Kentucky Law

Despite the enactment of 12 U.S.C. § 92, and quite apart from any debate over its continued existence, the Commissioner contends that national banks located in Kentucky may not engage in insurance activities, except in limited circumstances. The Commissioner presently finds support for this position in Ky. Rev. Stat. 287.030(4), which provides:

> No person who after July 13, 1984, owns or acquires more than one-half (1/2) of the capital stock of a bank shall act as insurance agent or broker with respect to any insurance except credit life insurance, credit health insurance, insurance of the interest of a real property mortgagee in mortgaged property, other than title insurance.

In an opinion addressing an earlier version of this statute, the Kentucky Attorney General concluded that a provision prohibiting one person from holding controlling interest in a bank was applicable to national banks doing business in Kentucky. Ky. OAG 70-643. Statutory language similar to the present language prohibiting insurance activities by persons owning more than one-half of the stock of a bank was added in 1972. 1972 Kentucky Acts ch. 174. In 1981, the Kentucky Attorney General issued an opinion, based upon this statute, which concluded that a bank holding company could not acquire 100% of the outstanding stock of an insurance agency. Ky. OAG

81-173. In 1984, the present language was enacted as a part of the Kentucky Bank Holding Company Act. 1984 Kentucky Acts ch. 130.

Since 1984, the Commissioner has taken the position that the present version of the statute, as set forth above, is applicable to national banks, and has used the 1970 Attorney General's Opinion as support for his position. See Letter from Assistant General Counsel Stephen B. Cox to David F. Presser (February 28, 1986) [Record #16, Tab 7].[3] The Commissioner has also taken the position that 12 U.S.C. § 92 only provides that the sale of insurance by a national bank is not *ultra vires* to the bank's charter, and does not convey a unilateral right to engage in the business of insurance.

Having provided the legal framework for the discussion, the court will now turn to the substantive claims of the parties. A very narrow question is presented: May the Commissioner, consistent with federal law, refuse to permit national banks to apply for insurance licenses?

IV. The Bank Holding Company Act

The Commissioner and the associations maintain that the Bank Holding Company Act (BHCA), 12 U.S.C. § 1841 *et seq.*, allows states to regulate bank holding companies and their subsidiaries, including national banks, in the manner prescribed in Ky. Rev. St. 287.030(4). If true, this conclusion would obviate the need to address the questions presented under 12 U.S.C. § 92.[4]

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[3]The Commissioner likely took this position prior to 1984, as well, although no documents to that effect have been presented to the court.

[4]In addressing this argument, this court will assume, without deciding, the continued existence of 12 U.S.C. §92. This is consistent with the position of the Commissioner and the associations that the court may decide the BHCA issue without reaching the question of the statute's continued existence.

The BHCA was enacted in 1956, to provide federal regulation of bank holding companies and the type of assets appropriate for such companies to control. S. Rep. No. 1095, 84th Cong., 1st. Sess. 1 (1955). Unlike national banks, which are primarily regulated by the Comptroller of the Currency, primary regulatory authority for bank holding companies was placed with the Board of Governors of the Federal Reserve System (Federal Reserve Board). 12 U.S.C. § 1842. The BHCA is divided into two principal areas. Section 3, 12 U.S.C. § 1842, governs the authority of the Federal Reserve Board with respect to banking subsidiaries of bank holding companies. Section 4, 12 U.S.C. § 1843, governs the acquisition of non-banking subsidiaries.

The Commissioner and the associations argue that Section 7 of the BHCA, 12 U.S.C. § 1846, permits the application of Ky. Rev. St. 287.030(4) to the plaintiff banks.[5] Section 7 provides, "No provision of this chapter shall be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to companies, banks, bank holding companies, and subsidiaries thereof." 12 U.S.C. § 1846. The Commissioner and the associations both misread and misinterpret this section.

This section did not grant any additional regulatory powers to the states. It merely preserved the powers extant at the time of enactment and such powers as may exist in the future. It neither enlarged nor diminished state regulatory powers with respect to national banks or bank holding companies. *American Trust Co., Inc.* v. *South Carolina*

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[5]In addressing this argument, the court again notes that each of the plaintiff banks is a wholly owned subsidiary of a bank holding company. [Record #25, 26, 27]. It is not clear whether these holding companies are Kentucky corporations.

State Board of Bank Control, 381 F.Supp. 313, 324 (D.S.C. 1974). The legislative history of the BHCA clearly reflects Congressional intent that it have a neutral effect on the dual system of banking regulation. This was the purpose for the inclusion of Section 7. *See Control and Regulation of Bank Holding Companies: Hearings on H.R. 2674 Before the House Comm. on Banking and Currency,* 84th Cong., 1st Sess. 366-67 (1955).

Since *McCullough* v. *Maryland,* 4 Wheat. 316 (1819), it has been beyond doubt that Congress can establish and regulate a national system of banks. Only where Congress has explicitly provided for state regulation of national banks has such regulation been permitted. Otherwise, a state cannot prevent a national bank from exercising its express powers. *See Franklin Nat. Bank* v. *New York,* 347 U.S. 373, 378 (1954).

Congress has typically permitted state regulation when it acts to preserve the dual system of banking in the United States, such as in Congressional treatment of branch banking for national banks. *See* 12 U.S.C. § 36; *First Nat. Bank in Plant City Fl.* v. *Dickinson,* 396 U.S. 122 (1969). Congress could have permitted national banks to conduct branching activities regardless of state law. *Cf. Lyons Savings & Loan Ass'n* v. *Federal Home Loan Bank Board,* 377 F.Supp. 11, 20 (N.D. Ill. 1974). However, it chose not to give national banks a competitive advantage over state banks.

In contrast, this case concerns an express power of certain national banks; a power granted by Congress, in the exercise of its unquestioned power to regulate the national banking system. The statute granting the power to sell insurance contains no language permitting states to absolutely prohibit of the exercise of this power by national banks. The only condition placed on the ability of these national banks to sell insurance is the requirement that

the involved insurer be licensed to do business in the state by the appropriate state authorities. In short, 12 U.S.C. § 92 grants an express power to national banks which states could not eliminate when the BHCA was enacted, and cannot eliminate now.

Having determined that 12 U.S.C. §1846 does not grant additional power to directly regulate national banks, the question then becomes whether states can regulate indirectly what they cannot regulate directly. This would be the end result if states were permitted to veto an express power of a national bank by virtue of their ability to regulate bank holding companies. This is an illogical result.

There is absolutely no doubt that Ky. Rev. St. 287.030(4) is a permissible regulation of bank holding companies. However, there is also no doubt that a statute which expressly prohibited all banks operating in Kentucky from selling insurance would be an unconstitutional violation of the Supremacy Clause. U.S. Const., art. VI, cl. 2. Such a statute would directly conflict with federal law, and a national bank would not be subject to such regulation. *National State Bank, Elizabeth, N.J.* v. *Long*, 630 F.2d 981, 987 (2nd Cir. 1980). The authority given to states to regulate bank holding companies does not give them any additional authority to regulate national banks simply because the national bank may happen to be a subsidiary of a bank holding company. Any authority a state has to regulate a national bank derives either from a specific grant of authority under federal law, or from the lack of an inconsistent federal law. It does not derive from the bank's form of ownership.

The Commissioner may regulate bank holding companies and their national bank subsidiaries. However, the BHCA does not permit the Commissioner to prohibit the exercise of an express power granted by Congress, without limitation, to national banks. Refusal to provide the requested applictions [sic] constitutes such an improper prohibition. This argument is without merit.[6]

V. The Existence of 12 U.S.C. §92

Relatively late in the briefing of this case, an issue was presented to the court regarding the continued existence of 12 U.S.C. § 92. In *Independent Insurance Agents of America, Inc.* v. *Clarke*, 955 F.2d 731 (D.C. Cir. 1992), the court concluded that Congress inadvertently repealed this section in 1918. One other court has addressed this issue, reaching the opposite result. *See American Land Title Ass'n* v. *Clarke*, Docket No. 91-6235 (2nd Cir. June 15, 1992). Not surprisingly, each side in the present case argues strenuously that the case which supports their position was correctly decided, while the other decision was poorly reasoned. This leaves the court with little choice but to examine the issue anew.

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[6]The authority cited by the Commissioner and the associations in support of this argument is inapposite since the cases either deal with a state's ability to regulate bank holding companies or to exercise regulatory authority over national banks as permitted under federal law. This court takes issue with neither of those state powers. *See Commercial Nat. Bank of Little Rock* v. *Board of Governors of the Federal Reserve System*, 451 F.2d 86 (8th Cir. 1971) (regulation of bank holding companies and branch banking); *Bank of New Orleans & Trust Co.* v. *Saxon*, 221 F.Supp. 576 (D.D.C. 1962), *aff'd* 323 F.2d 290 (D.C. Cir. 1963); *rev'd on jurisdictional grounds*, 379 U.S. 411 (1965) (regulation of bank holding companies); *Security Nat. Bank & Trust Co.* v. *First W. Va. Bancorp, Inc.*, 277 S.E.2d 613 (W. Va. 1981), *appeal dismissed*, 454 U.S. 1131 (1982) (regulation of bank holding companies); *Whitney Nat. Bank in Jefferson Parish* v. *James*, 189 So.2d 430 (La. App.), *appeal denied*, 191 So.2d 140 (1966) (regulation of bank holding companies and branch banking); *Braeburn Securities Corp.* v. *Smith*, 153 N.E.2d 806 (Ill. 1958), *appeal dismissed*, 359 U.S. 311 (1959) (regulation of bank holding companies).

For the sake of brevity, the court will not engage in a lengthy explication of the relevant legislative history. Rather, the court will simply state that it has examined the materials provided by the parties in support of their respective positions. Having reviewed the legislative history and studied the reasoned opinions of both the District of Columbia Circuit Court of Appeals and the Second Circuit Court of Appeals, this court agrees with the rationale of the Second Circuit. Accordingly, that part of the Second Circuit Opinion headed "A. Validity of 12 U.S.C. § 92" is adopted by this court the same as if set forth herein. *Id.*, at 2-10.

This court's examination of the legislative history of § 92 would have led it to the same conclusion quite apart from the Second Circuit's decision. To determine that § 92 has been repealed would be to circumvent logical statutory construction. This court also holds that "section 92 remains valid law." *Id.*, at 10.

VI. Preemption

Having determined that 12 U.S.C. § 92 continues to exist with the full force of law, the court now turns to the question of whether this section preempts Ky. Rev. St. 287.030(4). At the outset, the court again notes that § 92 grants to national banks located in towns with less than 5,000 persons the express power to act as insurance agents. National banks are not subject to attempted state control which would directly conflict with laws of the United States. *Starr* v. *O'Connor*, 118 F.2d, at 555.[7]

[7]The court takes no position on whether the express language of Ky.Rev.Stat. 287.030(4) permits its application directly to national banks. It is sufficient for the purpose of this inquiry that the Commissioner has applied it in such a manner.

In addressing the question of preemption, the Commissioner and the associations are correct that the standard for preemption does not change simply because national banks are involved. Under the Supremacy Clause of the Constitution, Art. VI, cl. 2, any state law which conflicts with federal law is "without effect." *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981). However, "consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Cipollone* v. *Liggett Group, Inc.*, 60 U.S. L.W. 4703, 4706 (1992), *quoting Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Accordingly, the Congressional purpose for the enactment is the ultimate determining factor in the preemption analysis. *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978).

As articulated in *Cipollone*, there are three principal ways for Congress to signal the paramount authority of federal law in a particular area. *Cipollone*, 60 U.S.L.W., at 4706-07. First, Congressional intent of supremacy may be expressly stated in the language of the statute or implicitly contained in its structure and purpose. *Jones* v. *Ruth Packing Co.*, 430 U.S. 519, 525 (1977). Second, in the absence of express Congressional guidance, state law will be preempted if it actually conflicts with federal law. *Pacific Gas & Elec. Co.* v. *Energy Resources Conversation and Development Comm'n*, 461 U.S. 190, 204 (1983). Finally, contrary state laws may be preempted if federal law has so thoroughly occupied a field as to allow a reasonable inference that Congress intended no state law to supplant federal authority. *Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153 (1982).

The Commissioner and the associations are correct that there is no express statement of supremacy in § 92, nor

has Congress occupied the entire field of national bank regulation. However, § 92 does appear to squarely conflict with Ky. Rev. St. 287.030(4), as it has been interpreted by the Commissioner.

The Commissioner and the associations contend that there is no actual conflict between § 92 and the state statute and raise three arguments in support of that position. For an actual conflict to exist, it must be a physical impossibility to comply with both the federal and state statutes. *Hillsborough County, Fla.* v. *Automated Medical Labs, Inc.*, 471 U.S. 707, 713 (1985).

First, the Commissioner and the associations maintain that the two statutes can be easily reconciled. This argument attempts to weaken the express language of § 92, by massaging the Commissioner's 1986 position that § 92 merely provides that this insurance activity is not *ultra vires* to a national bank's charter. *See* Letter from Assistant General Counsel Stephen B. Cox to David F. Presser (February 28, 1986) [Record #16, Tab 7]. Section 92 itself disposes of this argument. If a national bank meeting the requirements of § 92 wishes to exercise the power granted to it under this statute, it cannot do so under the present interpretation of Kentucky law by the Kentucky Insurance Commissioner.

Indeed, the scant legislative history of § 92 itself reveals that the primary intent of § 92 was not to place national banks on the same footing as state banks in states where state banks were permitted to sell insurance. Rather, the primary intent was to strengthen small national banks by providing them with an additional source of revenue. *See* Letter from Comptroller John Skelton Williams to Senator Robert Owen (June 8, 1916) [included at 53 Cong. Rec. 11001]. There is no indication that Congress intended that § 92 would only apply where it was needed to allow national banks to compete with state banks. There is ab-

solutely no authority for the Commissioner's pseudo *ultra vires* argument. It is indeed impossible to reconcile these two provisions.

Second, the Commissioner and the associations contend that Ky.Rev. St. 287.030(4) does not purport to regulate national banks. Instead, they contend that the statute only regulates the licensure of insurance agents within the Commonwealth, based upon their affiliation with bank holding companies. This argument is disingenuous at best, and erroneous at worst. The section is included within a statute addressed to limitations on the powers of banks, and is contained in the chapter of the Kentucky Revised Statutes dedicated to banks and trust companies. It is an attempt to regulate bank holding companies, and, by interpretation, their national bank subsidiaries. It is, at best, an indirect regulation of insurance licenses. As interpreted by the Commissioner, it is in direct conflict with a federal statute and is preempted.

Finally, the Commissioner and the associations argue that Ky. Rev. Stat. 287.030(4) is consistent with the objectives of Congress in enacting § 92. This relies upon a statement in Comptroller Williams' letter which refers to allowing national banks to become more competitive with state banks which are authorized to engage in nonbanking activities. However, this court's reading of the Williams letter indicates that the primary objective was to ensure profitability for smaller national banks which would allow them to both lend money at nonusurious rates and make a better return to their stockholders. Comptroller Williams did not specifically reference the ability of state banks to engage in the business of insurance, but merely pointed out that some state banks were able to carry on nonbanking activities. Recognizing that fact, he could have recommended that language be included which limited the exercise of this power to states where both national and state

banks could engage in insurance activities. However, no such limitation was included. Reflecting the desire to provide an additional revenue source to national banks, § 92 was drafted to apply to all national banks meeting its requirements. Ky. Rev. Stat. 287.030(4) is not consistent with Congressional objectives in enacting § 92.

The court has no difficulty concluding that § 92 preempts Ky. Rev. Stat. 287.030(4). To the extent that the Commissioner interprets the Kentucky statute to prohibit national banks in Kentucky from utilizing § 92, that interpretation is in direct conflict with federal law. The Commissioner is attempting to prevent national banks from participating in the sale of insurance simply because they are banks. This is contrary to the Congressional enactment. Congress clearly knew how to defer to state regulatory authority over national banks. It did so in permitting states to determine whether national banks within their borders could engage in branch banking. 12 U.S.C. § 36. There is no such deference contained in § 92. The state statute, as interpreted, must give way in the face of contrary federal law. *Davis* v. *Elmira Savings Bank*, 161 U.S. 275 (1896). The plaintiff banks may not be prevented from applying for insurance licenses.

VII. The McCarran-Ferguson Act

Finally, the Commissioner and the associations argue that Ky. Rev. Stat. 287.030(4) is a valid exercise of state authority under the McCarran-Ferguson Act. 15 U.S.C. §§ 1011-1015. This act was passed in response to the Supreme Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which held that insurance companies were subject both to regulation by Congress and to federal anti-trust laws.

At issue in this case is 15 U.S.C. §1012(b) which provides:

> (b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the Purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

It is perhaps simpler to address this statute in reverse order and first examine whether 12 U.S.C. § 92 is an Act of Congress which relates to the business of insurance.

The "business of insurance" has been narrowly defined, and it seems fairly obvious that § 92 does not constitute Congressional regulation of that business. This section is a part of the National Bank Act, and its function is to grant additional powers to national banks. That the power granted to the national banks involves insurance does not transform this section into a regulation of the business of insurance. Accordingly, § 92 will not invalidate the Kentucky statute on these grounds.

Moreover, the other portion of 15 U.S.C. 1012(b) is equally inapplicable to this case. Just as § 92 does not regulate the business of insurance, neither does Ky. Rev. Stat. 287.030(4) constitute insurance regulation. As previously mentioned, this statute regulates bank holding companies, and is contained in chapter of the Kentucky Revised Statutes regulating banks and trust companies. It does not appear in the portion of the Kentucky Revised Statutes which regulates insurance. It relates to the powers of bank holding companies, not to the powers of insurance companies or agents.

To determine whether a state law or regulation governs the "business of insurance", the Supreme Court has articulated a three-part test. The court must consider:

> [F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

Union Labor Life Ins. Co. v. *Pireno*, 458 U.S. 119, 129 (1982). Applying these criteria to the present case, the court reaches the inescapable conclusion that Ky. Rev. St. 287.030(4) does not regulate the business of insurance. The Kentucky statute is not concerned with transferring or spreading the risk of any policyholders, nor does bank holding company ownership of insurance entities constitute an integral part of the policy relationship between the insurer and the insured. Finally, bank holding companies are not entities within the insurance industry. The McCarran-Ferguson Act has no applicability to the issue now before the court. *See United States Auto Ass'n* v. *Muir*, 792 F.2d 356 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

VIII. Conclusion

Based upon the foregoing analysis, the court believes that the Commissioner is required to provide the plaintiff banks, and other similarly situated national banks, with applications for insurance licenses. The Commissioner's interpretation of law reflected in this litigation is incorrect.[8]

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[8]The court specifically declines to determine whether the Commissioner is required to issue licenses once the completed applications are received. Whether national banks are subject to Kentucky's criteria for the issuance of an insurance license is not properly before the court, and may well implicate McCarran-Ferguson in other respects. In any event, the court need not reach this issue in narrowly deciding that Ky.Rev.Stat. 287.030(4), as interpreted, is preempted by 12 U.S.C. §92, and does not permit the Commissioner to refuse to provide the requested applications.

This memorandum opinion and order contains the court's rulings on all pending motions except the motions for summary judgment which will be addressed by separate order. The court having considered the record and being otherwise sufficiently advised,

Accordingly,

IT IS HEREBY ORDERED:

(1) that the Commissioner's motion to dismiss, [Record #4], be, and is **DENIED**, in conformity with the reasons stated herein;

(2) that the associations' motion to dismiss [Record #7], be, and is **DENIED**, in conformity with the reasons stated herein; and

(3) that the plaintiffs' motion for leave to file a memorandum of supplemental authorities, [Record #43], be, and is **GRANTED**.

This 4th day of August, 1992.

/s/ Joseph M. Hood
JOSEPH M. HOOD, JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION

Civil Action No. 91-3

THE OWENSBORO NATIONAL BANK, et al., - - *Plaintiffs,*
and
THE UNITED STATES OF AMERICA, - *Intervenor-Plaintiff,*
v.
ELIZABETH P. WRIGHT, Commissioner, Department of Insurance, Commonwealth of Kentucky - - - - - *Defendant,*
and
KENTUCKY STATE ASSOCIATION OF LIFE UNDERWRITERS, et al., - - - - *Intervenors.*

DECLARATION

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss

I, ROSA M. KOPPEL, being duly sworn, depose and say:

(1) I am a Senior Trial Attorney in the Litigation Division at the office of Comptroller of the Currency ("OCC"). I have been employed by the OCC since July 9, 1984, and am a member in good standing of the New York State and District of Columbia Bars.

(2) The OCC has primary supervisory responsibility over the activities of all national banks operating in the United States. *See* 12 U.S.C. §§ 1, *et seq.*

(3) I make this declaration upon the basis of information provided to me by OCC's Communications Division and a letter from Michael F. Crotty, Deputy General Counsel for Litigation, American Bankers Association, to Lester N. Scall, Senior Trial Attorney, dated April 3, 1992, a true copy of which is attached hereto as Exhibit "A".

(4) According to the most recent statistics maintained by OCC, as of December 31, 1991, there are 3,778 national banks reporting to the OCC.

(5) Exhibit "A" to my declaration contains the results of a recent survey of the various state bankers' associations conducted by the American Bankers Association. The purpose of the survey was to determine how many national and state banks are conducting the insurance agency activities authorized by 12 U.S.C. § 92.

(6) According to the survey results, there are as many as 179 national banks in fifteen states throughout the nation conducting insurance agency activities pursuant to 12 U.S.C. § 92.

(7) In addition, from the information presently available, there are at least 115 state-chartered banks conducting insurance activities pursuant to state statutes that allow them to engage in the same activities that are authorized for national banks.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 14th day of April, 1992.

/s/ ROSA M. KOPPEL
ROSA M. KOPPEL
Senior Trial Attorney
Litigation Division

EXHIBIT "A"

[LETTERHEAD OF AMERICAN BANKERS ASSOCIATION]

April 3, 1992

Lester N. Scall, Esq.
Litigation Division
Office of the Comptroller of the Currency
Independence Square
250 E Street, SW
Washington, DC 20219

Re: *IIAA* v. *Clarke*

Dear Les:

This is an update of my March 9 letter to you. It differs from the March 9 letter only in minor respects. As I told you in that letter, the ABA has asked the various state bankers' associations around the country to examine into the insurance activities of their respective members in order to determine how many banks, nationwide, are relying upon the authority of Section 92 of the National Bank Act—either directly in the case of national banks or indirectly in the case of state chartered banks in those states where there is a "parity" or "wild card" statute, but no other independent source of statutory authority for general insurance agency powers. The results of that survey are as follows:

	National Banks	State Banks
Arkansas	7	N/A
California	3	N/A
Delaware	1	N/A
Indiana	1	N/A
Iowa	17	N/A
Kansas	34	
Maryland	0	4
Minnesota	50 (approximate)	N/A
Missouri	2	3
New York	5 (approximate)	N/A
North Dakota	16	105
Oregon	3	N/A
South Carolina	10 (approximate)	N/A
South Dakota	12	N/A
Utah	0	2 or 3
Virginia	3	N/A
Washington	10 to 15	N/A

Alabama, Alaska, Arizona, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, Texas, Vermont, and West Virginia report no known use of the "town of 5000" rule, either by national or state chartered banks. The Kansas number is a total of state and national banks; that state's bankers association is unable to differentiate between the two on short notice. The remaining states have not supplied any useful information to us.

Sincerely,

/s/ MICHAEL F. CROTTY
MICHAEL F. CROTTY